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Informative Opinion A of 1959 Estate Planning

Dicta Editorial Board

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BAR BRIEFS

INFORMATIVE OPINION A OF 1959 ESTATE PLANNING

*Standing Committee on the Unauthorized Practice of Law,
of the American Bar Association*

This Committee has received inquiries concerning the propriety of the conduct of corporations and individuals who are not lawyers but who, through advertisements, brochures, orally or otherwise, solicit legal work or hold themselves out to the public as being available to give legal assistance in the field of estate planning or to do the whole job of planning an estate.

The phrase "estate planning" has come into existence in recent years to refer to the orderly arrangement of an individual's assets so as to provide most effectively for the economic needs of himself while living and of those dependent upon him after his death. At the outset it should be recognized that there are certain lay activities which are legitimate aspects of estate planning and which do not involve legal work, but which are in the nature of an analysis of the facts and assets of an estate in relation to economic needs, and may extend to giving general information as to laws affecting the disposition of estates, though without any specific application thereof to a particular estate or individual situation. These activities may be properly performed by persons who are not lawyers, and are discussed later in this opinion. In general, however, pursued to its proper conclusion, estate planning necessarily involves the application of legal principles of the law of wills and decedents' estates, the law of trusts and future interests, the law of real and personal property, the law of taxation, practice in the Probate and Chancery Courts, or other fields of law. When such is the case, the work involved in estate planning includes legal research, the giving of legal advice or the drafting of legal instruments.

There can thus be no question that estate planning, except where it is in the nature of an analysis of the facts and assets of an estate as above described, involves legal work and constitutes the practice of law. When engaged in by an individual who is not a lawyer, or by a corporation, it is the unauthorized practice of law. Nor does it become any the less the practice of law because the suggestion is made that the legal advice given or legal work done should be reviewed by an attorney. It is well settled that both corporations and laymen are prohibited from practicing law directly, and that they may not practice law indirectly by hiring lawyers to practice law for them. Accordingly, neither corporations nor laymen may engage in estate planning by soliciting the legal work involved and then hiring lawyers to perform it. This is also the unauthorized practice of law. In addition, under Canon 47 of the Canons of Professional Ethics of the American Bar Association no lawyer shall permit his professional services, or his name, to be used

in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

It is elementary that under Canon 27 lawyers are forbidden to solicit legal employment by circulars, advertisements, or otherwise. Thus, no lawyer may solicit legal work in the field of estate planning or be employed to do such work for a corporation or a layman which does. But the public could not be protected by prohibiting the lawyer from soliciting legal work in the field of estate planning, if at the same time laymen and lay agencies were permitted, in any guise, to advertise a claimed legal competence in this field. It should be clear, therefore, that the holding out by any lay agency to the public, directly or indirectly, overtly or subtly, of its willingness to perform legal services in the field of estate planning is itself the unauthorized practice of law. Also, no lay agency may hold itself out to the public as willing to do the whole job of "estate planning" without becoming engaged in the unauthorized practice of law.

In addition, the lawyer-client relationship requires a duty of absolute loyalty to the client, and undivided allegiance. Under Canons 6 and 35 of the Canons of Professional Ethics the lawyer cannot permit his professional services to be controlled or exploited by a lay agency intervening between him and his client.

Also, under Canon 34 lawyers may not divide fees with laymen, and this principle applies to fees for legal work in the field of estate planning. Moreover, the sharing by a layman of a lawyer's fees constitutes the unauthorized practice of law.

Illustrative of the treatment of the subject in the Courts is the decision of the Superior Court of Cook County, Illinois, in *Chicago Bar Association v. Financial Planning, Inc.*,* decided March 21, 1958, in which the court held that certain estate planning services involved the giving of "legal advice on some of the most important problems which can arise during a man's lifetime and after his death," adding that "Even if this advice were confined to tax savings alone, it still would amount to the practice of law * * *" and "the contention that the advice is comprised merely of suggestions, and is always subject to be reviewed by a lawyer, is no excuse for the conduct of the defendants. The practice of law should be confined to lawyers without the interposition of unauthorized practitioners who solicit this business directly or indirectly."

* This case is reported in 26 Law Week 2662, and 24 Unauthorized Practice News No. 2, p. 29.

COMPLIMENTS

of

SYMES BUILDING

The decree in this case permanently enjoined the defendants, their agents and employees from:

- "(a) Giving legal counsel and advice,
- (b) Rendering legal opinions,
- (c) Preparing, drafting and construing legal documents,
- (d) Preparing estate plans which embody legal analysis, counsel and advice,
- (e) Holding themselves out as persons who prepare estate plans embodying legal analysis, counsel and advice,
- (f) Charging and collecting fees for legal counsel, advice, or services rendered by them, or their agents, or employees,
- (g) From practicing law in any form, or holding themselves out as having a right to practice law, or soliciting employment to prepare estate plans embodying legal analysis, counsel and advice, or from charging, or collecting fees, or payments for legal services rendered by said defendants and each of them or their agents, or employees."

It is not intended by the opinion of this Committee to proscribe activities of those groups which serve various fields related to estate planning unless they involve the performance of legal services as outlined herein. Activities geared to motivating the individual concerned to do something about his affairs and to seek the advice of his own lawyer as early as possible, preferably from the outset, with regard to the development of an overall estate plan, are in the public interest. Advice on matters of law with respect to the prospect's particular factual situation, however, must not be given.

The activities of lay groups described above should conform to the standards of propriety set forth in the several Statements of Principles developed through the Conference method between the American Bar Association and various business and professional groups. Moreover, because of the shadowy borderline between an analysis of facts and assets of an estate and the application of legal principles to them, it is clearly within the spirit of the several Statements of Principles that the activities of these groups should be performed in close cooperation with the client's own attorney. It is contemplated that any disputes which may arise with respect to the activities of such business and professional groups shall be governed by such Statement of Principles. The understandings reached in these Principles have served to encourage the public to seek proper legal guidance, the lay groups not to transgress upon the sphere of activity properly reserved for the legal profession, and to bring about better understanding and cooperation between those groups and the Bar.